

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GABRIEL S. LOCASTRO,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

Case No. C14-5499-TSZ-BAT

**REPORT AND
RECOMMENDATION**

Gabriel Locastro seeks review of the denial of his Supplemental Security Income and Disability Insurance Benefits applications. He contends the ALJ erred by finding him not fully credible, failing to include all of his impairments in his RFC/hypothetical, finding he could perform his past work, and failing to include all of the evidence in the record. Dkt. 13. As discussed below, the Court recommends the Commissioner's decision be **AFFIRMED** and the case be **DISMISSED** with prejudice.

BACKGROUND

Mr. Locastro is currently 32 years old, has at least a high school education, and has worked as a check clerk, material handler, and carpenter. Tr. 27, 60. On October 18, 2012, he applied for benefits, alleging disability as of June 12, 2012. Tr. 13. His applications were denied

1 initially and on reconsideration. *Id.* The ALJ conducted a hearing on January 24, 2014, finding
2 Mr. Locastro not disabled. Tr. 28.

3 Utilizing the five-step disability evaluation process,¹ the ALJ found Mr. Locastro met the
4 insured status requirements through December 31, 2017; had not engaged in substantial gainful
5 activity since the alleged onset date; had severe impairments of obesity, tinnitus, hearing loss,
6 right shoulder abnormality, thoracic back abnormality, right ankle abnormality, depression,
7 posttraumatic stress disorder (“PTSD”), and status post traumatic brain injury (“TBI”); and that
8 these impairments did not meet or equal the requirements of a listed impairment.² Tr. 15-16.

9 The ALJ further found that Mr. Locastro had the residual functional capacity (“RFC”) to perform
10 light work that did not require more than occasional overhead reaching or more than frequent
11 reaching in other directions using his right hand; that did not require more than occasional
12 climbing, balancing, stooping, kneeling, crouching, or crawling; that did not require working on
13 scaffolding or climbing more than a single flight of stairs at a time; that did not require exposure
14 to hazards or to more than occasional vibration; that did not require concentrated exposure to
15 pulmonary irritants; that is performed in a quiet or very quiet noise environment or that allows
16 Mr. Locastro to wear hearing protection; that consists of simple, routine tasks; that does not
17 require teamwork; that does not require more than superficial interaction with the general public;
18 and that does not require the exercise of more than routine judgment. Tr. 18. The ALJ found
19 Mr. Locastro could perform his past work as a check clerk, and in the alternative, small parts
20 assembler, mailroom clerk, and marking clerk. Tr. 27. As the Appeals Council denied Mr.
21 Locastro’s request for review, the ALJ’s decision is the Commissioner’s final decision. Tr. 1-6.

22
23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

DISCUSSION

A. The ALJ Did Not Err in Evaluating Mr. Locastro's Credibility

Mr. Locastro's first assignment of error contends the ALJ "erred in finding claimant capable of performing light work and other work that exists in the national economy by ignoring claimant's psychological limitations." Dkt. 12 at 9. The caption is misleading, as Mr. Locastro's argument is merely a challenge to the ALJ's adverse credibility determination.³

The ALJ provided a number of reasons for finding Mr. Locastro's testimony not credible: (1) Mr. Locastro's statements regarding physical limitations were consistent with his RFC; (2) he engaged in activities that were inconsistent with his allegations of disabling limitations; (3) he made inconsistent statements regarding his education history; (4) he received unemployment benefits; (5) the medical evidence was inconsistent with the degree of physical and mental limitation claimed; and (6) evidence suggested Mr. Locastro exaggerated his symptoms and limitations. Tr. 19-24. Mr. Locastro challenges only one of these.

Mr. Locastro's single challenge contends the ALJ erred in relying on his daily activities in finding him not credible. Dkt. 12 at 12-13. The ALJ found Mr. Locastro's ability to attend to his personal care, provide some basic care for his son, prepare meals, perform household chores such as mowing and vacuuming, go outside alone, drive, watch television, and spend time with

³ Mr. Locastro also states that the ALJ "gave only slight reference to medical evidence in concluding Claimant's residual functional capacity," the ALJ "should have consulted an independent medical expert to review, analyze and testify concerning claimant's mental health impairments," and the ALJ "failed to comply with his requirement to fully develop the record, [or] give full consideration to all evidence." Dkt. 12 at 9-10. But beyond these conclusory statements, Mr. Locastro fails to develop any arguments, and cites no authority or evidence from the record in support. The Court may deem arguments that are unsupported by explanation to be waived. *See Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008) at *2 (unpublished opinion) (*citing Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue)). Accordingly, the Court declines to address the additional points Mr. Locastro raises.

1 his wife daily was inconsistent with his testimony regarding back pain, his ability to lift 20
2 pounds and walk a few miles, difficulties dealing with people, anger problems, irritability, and
3 difficulty maintaining concentration and attention. Tr. 19, 23 (*citing* Tr. 224-31, 335); *see also*
4 *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (a claimant's reported daily activities can form
5 the basis for an adverse credibility determination if they consist of activities that contradict the
6 claimant's "other testimony"; or that are transferable to a work setting."). The Court agrees the
7 ALJ erred because Mr. Locastro's testimony was not inconsistent with the daily activities the
8 ALJ described. Additionally, even if the activities the ALJ discussed were inconsistent with Mr.
9 Locastro's stated impairments, the ALJ overstates the evidence. *Compare* Tr. 23 *with* Tr. 224-31
10 (stating he is unable to sleep more than three hours each day, he is unable to manage his
11 finances, he cooks "top ramen noodles," he avoids other cooking because he "almost burned the
12 house down," he goes outside "only when I have to" and gets around as a *passenger* in the car
13 (rather than as driver)).

14 Despite this error, the ALJ provided other unchallenged reasons, which are specific, clear
15 and convincing and supported by substantial evidence. *See Burrell v. Colvin*, No. 12-16673, —
16 F.3d —, 2014 U.S. App. LEXIS 24654 (9th Cir. Dec. 31, 2014) (*citing Molina v. Astrue*, 674
17 F.3d 1104, 1112 (9th Cir. 2012)). For example, the ALJ also found that Mr. Locastro received
18 unemployment benefits through the end of 2013, and he testified he told the state he was looking
19 for work while receiving those benefits but that he was not actually looking for work. Tr. 23; *see*
20 *also* Tr. 47. On this basis, the ALJ properly concluded Mr. Locastro's "willingness to make
21 inaccurate reports in order to receive benefits" undermined his credibility. Tr. 23. *See, e.g.,*
22 *Carmickle v. Commiss'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (recognizing
23 receipt of unemployment benefits could affect a claimant's credibility); *cf. Smolen*, 80 F.3d at

1 1284 (ALJ may use “ordinary techniques of credibility evaluation, such as the claimant’s
 2 reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony
 3 by the claimant that appears less than candid.”). Thus, because the ALJ gave at least one valid
 4 reason for rejecting Mr. Locastro’s testimony, Mr. Locastro has not established harmful error.
 5 *Carmickle*, 533 F.3d at 1162 (including an erroneous reason, among other reasons, to discount a
 6 claimant’s credibility is at most harmless error if the other reasons are supported by substantial
 7 evidence and the erroneous reason does not negate the validity of the overall credibility
 8 determination). Accordingly, the Court recommends affirming the ALJ’s credibility finding.

9 **B. The ALJ Did Not Err in Forming Mr. Locastro’s RFC/Hypothetical**

10 Mr. Locastro next argues the ALJ “erred in not submitting a hypothetical question to the
 11 Vocational Expert [“VE”] that included all of claimant’s impairments.” Dkt. 12 at 13. Mr.
 12 Locastro makes no challenge to the ALJ’s step-two findings (including depression, PTSD, and
 13 TBI), nor does he contend the ALJ erred in evaluating the medical evidence. Rather, Mr.
 14 Locastro first argues the hypothetical posed by the ALJ to the VE “consisted fundamentally only
 15 of exertional limitations.” *Id.* As the Court understands the argument, Mr. Locastro suggests the
 16 ALJ erred by omitting *non-exertional* limitations. But Mr. Locastro’s argument is contradicted
 17 by the record. The ALJ’s RFC/hypothetical reflects that the ALJ included non-exertional
 18 limitations, finding Mr. Locastro can perform light work that is performed in a

19 quiet or very quiet noise environment or allows the worker to wear
 20 hearing protection that would reduce the noise environment to
 21 quiet or very quiet; that consists of simple, routine tasks; that does
 22 not require teamwork; that does not require more than superficial
 23 interaction with the general public; and that does not require the
 exercise of more than routine judgment.

Tr. 18. Thus, there is no support for Mr. Locastro’s contention that the RFC/hypothetical fails to
 incorporate any meaningful non-exertional limitations.

1 But beyond his meritless assertion regarding non-exertional limitations, Mr. Locastro
2 fails to explain why the ALJ improperly assessed his RFC/hypothetical. As the Court has
3 already noted, Mr. Locastro does not challenge the ALJ's step-two findings. He also does not
4 challenge the ALJ's evaluation of any of the medical evidence. Rather, in a conclusory manner
5 and without citation to the record, he states the "ALJ made no effort to address the non-
6 exertional limitations and restrictions posed by Plaintiff's mood swings, difficulty in
7 concentrating, difficulty in dealing with people." Dkt. 12 at 13. Mr. Locastro describes
8 symptoms without identifying the *limitations* the ALJ did not incorporate into his RFC.
9 Accordingly, any error is harmless. *See Molina*, 674 F.3d 1104, 1111 (9th Cir. 2012).

10 Mr. Locastro also appears to believe the ALJ erred by not incorporating evidence from
11 his VA records, arguing "[t]he record contains multiple and continuous treatment documents
12 from the Veterans Administration ["VA"], American Lake." Dkt. 12 at 13. But Mr. Locastro
13 does not identify which records he contends the ALJ ignored. Nonetheless, contrary to Mr.
14 Locastro's contention, the ALJ considered a number of VA mental health records. *See* Tr. 21-25
15 (*citing* Tr. 914-17, 971-80, 1049-53, 1349-65, 1402-06, 1437-41). In discussing a fifty percent
16 VA disability rating related to PTSD, the ALJ found it "consistent with the mental limitations
17 and the residual functional capacity." Tr. 25. But even if the VA disability rating had been more
18 favorable to Mr. Locastro, and even if the ALJ were to have rejected it, "a VA rating of disability
19 does not necessarily compel the [Social Security Administration] to reach an identical result."
20 *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (*citing* 20 C.F.R. § 404.1504).
21 Thus, as Mr. Locastro has failed to identify specific limitations the ALJ improperly failed to
22 incorporate, the Court recommends affirming the ALJ.

23 **C. The ALJ's Step Four Error was Harmless**

1 Mr. Locastro also argues the ALJ erred in finding he could perform his past work as a
2 check clerk — a reasoning level three job — given the ALJ’s RFC finding that he was limited to
3 simple, routine tasks and work that does not require the exercise of more than routine judgment.
4 Dkt. 12 at 14. According to the Dictionary of Occupational Titles (“DOT”), reasoning level
5 three jobs require the ability to “[a]pply commonsense understanding to carry out instructions
6 furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete
7 variables in or from standardized situations.” DOT, App. C. Reasoning level two jobs require
8 the ability to “[a]pply commonsense understanding to carry out detailed but uninvolved written
9 or oral instructions. Deal with problems involving a few concrete variables in or from
10 standardized situations.” *Id.* Mr. Locastro concedes that courts have found reasoning level two
11 jobs to be consistent with the ability to do simple, routine work.⁴ *See* Dkt. 12 at 14-15.

12 An ALJ may rely on expert testimony which contradicts the DOT so long as the record
13 contains persuasive evidence to support the deviation. *Johnson v. Shalala*, 60 F.3d 1428, 1435-
14 36 (9th Cir. 1995) (VE testified specifically about the characteristics of local jobs and properly
15 found their characteristics to be sedentary, despite DOT classification as light work); *see also*
16 SSR 00-4p (ALJ must identify and obtain reasonable explanation for any conflicts between
17 information in the DOT and occupational evidence provided by VEs). At step five, the ALJ
18 found Mr. Locastro could perform alternate jobs as small parts assembler (DOT 706.684-022,
19

20 ⁴ Though the Ninth Circuit has not decided the issue, other courts have concluded there is no
21 conflict between a reasoning level two job and routine, non-complex work. *See, e.g., Hackett v.*
22 *Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005) (Level two reasoning consistent with simple and
23 routine work tasks); *Money v. Barnhart*, 91 Fed.Appx. 210, 214, 2004 WL 362291, at *3 (3rd
Cir. 2004) (“Working at reasoning level 2 would not contradict the mandate that her work be
simple, routine and repetitive”); *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005)
(finding that a limitation to simple, repetitive tasks did not contradict a finding that the plaintiff
could do work of reasoning level 2).

1 reasoning level two);⁵ mailroom clerk (DOT 209.687-026, reasoning level three); and marking
 2 clerk (DOT 209.587-034, reasoning level two). Though the ALJ asked the VE whether his
 3 testimony conflicted with the DOT, the ALJ failed to obtain explanations for the discrepancies in
 4 his testimony. Tr. 59, 62. Thus, to the extent the ALJ found Mr. Locastro could perform work
 5 requiring reasoning level three, he erred.

6 In *Meanel v. Apfel*, 172 F.3d 1111, 1114-15 (9th Cir. 1999), the Ninth Circuit indicated
 7 that it did not need to address a claimant's assignments of error regarding one of two jobs
 8 identified by the ALJ given that the number of positions for the other job — between 1,000 and
 9 1,500 in the local area — constituted a significant number. In *Barker v. Secretary of Health &*
 10 *Human Servs.*, 882 F.2d 1474, 1479 (9th Cir. 1989), although the Ninth Circuit declined to
 11 exclude certain jobs identified, it found that, even if those jobs were excluded, the remaining
 12 jobs—1,266 jobs in the Los Angeles/Orange County area—constituted a significant number.⁶
 13 Here, considering the ALJ identified 1,200 jobs statewide and 382,000 jobs nationally that Mr.
 14 Locastro could perform even excluding consideration of the check clerk and mailroom clerk
 15 positions, the Court finds the ALJ's step five decision is supported by substantial evidence.

16 Given the identification of a significant number of other types of jobs requiring reasoning
 17 level two, Mr. Locastro has failed to demonstrate reversible harm. *See Carmickle*, 533 F.3d at

18 ⁵ The DOT number (DOT 706.684-022) indicated by the VE and the ALJ corresponds to “small
 19 products assembler,” rather than “small parts assembler” as characterized by the VE and ALJ.

20 ⁶ *See also Gray v. Comm'r, Soc. Sec. Admin.*, No. 09-35212, 365 Fed. Appx. 60, 2010 WL
 21 440581 at *3 (9th Cir. 2010) (980 jobs in Oregon and 59,000 jobs nationally significant);
 22 *Thomas v. Barnhart*, 278 F.3d 947, 960 (1,300 jobs in Oregon region and 622,000 in the national
 23 economy significant); *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995) (2,300 jobs in San
 Diego County and 64,000 jobs nationwide significant); *Martinez v. Heckler*, 807 F.2d 771, 775
 (9th Cir. 1987) (amended) (3,750 to 4,250 jobs regionally significant); *Murphy v. Colvin*, No. 13-
 0015-RAJ, 2013 WL 5371955 (W.D. Wash. 2013) (17,782 jobs nationally significant); *Meissl v.*
Barnhart, 403 F. Supp. 2d 981, 982 n.1 (C.D. Cal. 2005) (approximately 1,700 jobs locally and
 38,000 jobs nationally significant).

1 1162-63 (9th Cir. 2008) (the relevant inquiry “is not whether the ALJ would have made a
 2 different decision absent any error, . . . [but] whether the ALJ’s decision remains legally valid,
 3 despite such error.”); *see also Meanel*, 172 F.3d at 1114-15. The Court thus recommends
 4 affirming the ALJ.

5 **D. New Evidence**

6 Finally, Mr. Locastro argues he is entitled to a remand for consideration of new and
 7 material evidence. Dkt. 12 at 15. He provides the Court eighty-one pages of documentation he
 8 contends warrant remand. *See* Dkt. 12-1. The Court distinguishes between two types of new
 9 evidence in Social Security cases: (1) evidence that was not before the ALJ but that was
 10 submitted to and considered by the Appeals Council;⁷ and (2) evidence that is not part of the
 11 administrative record but that was provided for the first time to this court on review (sentence six
 12 new evidence). As the Commissioner observes, the first portion of the document Mr. Locastro
 13 presents to this court on appeal appears in the record as Exhibit 14B; it was submitted to and
 14 considered by the Appeals Council. *See* Tr. 1-6, 157-70; *see also* Dkt. 12-1 at 1-15. The
 15 remainder of the document appears to be absent from the administrative record.

16 Mr. Locastro makes no argument that Exhibit 14B (and its counterpart in the documents
 17 he attaches) deprives the record of substantial evidence supporting the ALJ’s decision.⁸ *See*
 18 *Brewes*, 682 F.3d at 1163. Thus, to the extent any valid arguments exist, the arguments have
 19 been waived. *See Avila*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008) at *2

20 ⁷ *See Brewes v. Comm’r, Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) (Evidence
 21 submitted to and considered by the Appeals Council after the ALJ’s decision is properly part of
 22 the administrative record, and the Court must consider it when reviewing the Commissioner’s
 23 final decision for substantial evidence) (*citing Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir.
 1993).

⁸ Mr. Locastro’s reply states only that “the ALJ substantially ignored” his PTSD and TBI and his
 related VA disability rating. Dkt. 14 at 3.

(citing *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue)). But even if the Court were to assume any arguments had not been waived, it concludes Exhibit 14B does not deprive the record of substantial evidence supporting the ALJ's decision. Exhibit 14B contains a February 18, 2014 VA Rating Decision and an accompanying explanation of entitlement based on that rating. Tr. 157-70; Dkt. 12-1. The Rating Decision includes an evaluation of fifty percent for "migraine headaches residual of traumatic brain injury," twenty percent for "thoracic degenerative disc disease," a finding of incompetency, and a "temporary evaluation of 100 percent" for an unspecified hospitalization. *Id.* The ALJ found other VA records containing a finding of incompetency and a fifty percent rating related to PTSD with TBI and for sleep apnea were not inconsistent with Mr. Locastro's RFC; a finding Mr. Locastro does not challenge. *See* Tr. 25 (citing Tr. 1349-56). Mr. Locastro has not shown that the rating decision in Exhibit 14B is inconsistent with, or that it undermines the ALJ's findings regarding the other VA records he considered — *see* Tr. 21-25 (citing Tr. 914-17, 971-80, 1049-53, 1349-65, 1402-06, 1437-41) — or his overall decision.

The documentation Mr. Locastro provides that does not appear in Exhibit 14B, Dkt. 12-1 at 16-81, is "sentence six" new evidence. To justify a remand for consideration of this evidence, Mr. Locastro must show that the new evidence is "material" and that there is "good cause" for his failure to include the evidence in the record during the administrative proceedings. 42 U.S.C. § 405(g) (sentence six);⁹ *see also Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991). To be

⁹ Sentence six of 42 U.S.C. § 405(g) provides:

The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any

1 material, “the new evidence must bear ‘directly and substantially on the matter in dispute.’”
 2 *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001) (citation omitted). In addition, the
 3 claimant must demonstrate a “‘reasonable possibility’ that the new evidence would have changed
 4 the outcome of the administrative hearing.” *Id.* (citation omitted). To demonstrate good cause,
 5 the claimant must show the new evidence “was unavailable earlier.” *Id.* at 463.

6 The new evidence Mr. Locastro presents to this Court consists of a “C&P [compensation
 7 and pension] PTSD Exam” dated January 19, 2014, Dkt. 12-1 at 18-52; a “C&P Exam” for
 8 “Residuals of Traumatic Brain Injury,” dated January 9, 2014, Dkt. 12-1 at 53-63; and Disability
 9 Benefits Questionnaires regarding headaches, ear conditions, and back conditions, Dkt. 12-1 at
 10 64-81. These exams diagnosed PTSD and mild TBI, and identified chronic back pain and
 11 headaches as symptoms. *See* Dkt. 12-1 at 18. The examiner’s January 19, 2014 medical opinion
 12 opined Mr. Locastro’s cognitive and psychological/neurobehavioral symptoms were less likely
 13 associated with residuals of mild TBI and more likely associated with “possible history of pre-
 14 morbid academic struggles, . . . current mental health problems (e.g., PTSD; other anxiety and
 15 mood symptoms), subjective reports of chronic bodily pain, . . . chronic sleep disturbance, . . .
 16 fatigue, and current psychosocial stressors. . .” Dkt. 12-1 at 50. In numerous instances, the

17
 18 time order additional evidence to be taken before the Commissioner of
 19 Social Security, but only upon a showing that there is new evidence which
 20 is material and that there is good cause for the failure to incorporate such
 21 evidence into the record in a prior proceeding; and the Commissioner of
 22 Social Security shall, after the case is remanded, and after hearing such
 23 additional evidence if so ordered, modify or affirm the Commissioner’s
 findings of fact or the Commissioner’s decision, or both, and shall file with
 the court any such additional and modified findings of fact and decision,
 and, in any case in which the Commissioner has not made a decision fully
 favorable to the individual, a transcript of the additional record and
 testimony upon which the Commissioner’s action in modifying or
 affirming was based.

1 exams noted Mr. Locastro's "evasiveness and inconsistent responding." *See, e.g.*, Dkt. 12-1 at
2 38, 40.

3 Mr. Locastro makes no serious argument that the additional evidence is material and
4 would in any way have changed the outcome of his hearing. Rather, he states in a conclusory
5 manner that the material is "critically important."¹⁰ His entire argument appears to be that the
6 ALJ erred in issuing his decision just twenty-six days after his hearing, despite the fact that at his
7 hearing, his attorney told the ALJ he had requested additional evidence from the VA, including
8 compensation and pension exams, "pending ratings" for his back, and "COP exams."¹¹ Tr. 37.
9 On the record before it and in light of the ALJ's RFC finding, the Court declines to find a
10 reasonable possibility that the new evidence would have changed the outcome of the ALJ's
11 decision. But even if material, Mr. Locastro fails to show he had good cause for failing to
12 present the evidence earlier. As the Commissioner observes, on April 1, 2014, Mr. Locastro's
13 attorney attempted, but failed, to fax to the Appeals Council the document he now attaches.¹²
14 *See* Dkt. 13 at 10-11, Dkt. 13-1. He offers no explanation for his misstep. Additionally, Mr.
15 Locastro's argument that the ALJ should have waited longer before issuing his decision so his
16 attorney could present additional evidence is without merit. As the Commissioner notes, the
17 hearing transcript demonstrates the ALJ asked Mr. Locastro's attorney whether "we should wait
18 for what you've requested to come in?" to which the attorney replied, "I want to move forward,
19 your honor." Tr. 38. The parties then agreed to take the evidence they had with the
20 understanding that Mr. Locastro's attorney would be "free to make more argument later in the

21 ¹⁰ Mr. Locastro's reply only discusses the content contained in Exhibit 14B, and not the
22 remaining evidence Mr. Locastro presented to the Court with his opening brief. *See* Dkt. 14 at 3.

23 ¹¹ The hearing transcript suggests Mr. Locastro's counsel believed these documents were
necessary to "support the actual ratings that we have." Tr. 37.

¹² Counsel for Mr. Locastro concedes that "[i]n preparing this opening brief it has come to light
attempts to file same with the Appeals Council were unsuccessful." Dkt. 12 at 15.

1 hearing.” Tr. 40. Accordingly, the Court finds Mr. Locastro fails to justify a sentence six
2 remand or to otherwise demonstrate error.

3 **CONCLUSION**

4 For the foregoing reasons, the Court recommends that the Commissioner’s decision
5 should be **AFFIRMED** and recommends the case be **DISMISSED** with prejudice.

6 A proposed order accompanies this Report and Recommendation. Objections, if any, to
7 this Report and Recommendation must be filed and served no later than **February 20, 2015**. If
8 no objections are filed, the matter will be ready for the Court’s consideration on **February 23,**
9 **2015**. If objections are filed, any response is due within 14 days after being served with the
10 objections. A party filing an objection must note the matter for the Court’s consideration 14
11 days from the date the objection is filed and served. Objections and responses shall not exceed
12 twelve pages. The failure to timely object may affect the right to appeal.

13 DATED this 6th day of February, 2015.

14
15 

16 **BRIAN A. TSUCHIDA**
17 United States Magistrate Judge
18
19
20
21
22
23